79172-4

NO. 79172-4

SUPREME COURT OF THE STATE OF WASHINGTON

MARK POTTER,

Appellant,

v.

WASHINGTON STATE PATROL,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT WASHINGTON STATE PATROL

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I. NATURE OF THE CASE

Appellant Mark Potter sued the Washington State Patrol challenging the validity of the impound of his vehicles when he was cited—twice—for driving while license suspended in the first degree. Mr. Potter's vehicles were impounded under RCW 46.55.113 and pursuant to former WAC 204-96-010. Mr. Potter failed to request a hearing under RCW 46.55.120 to challenge either impound and his vehicles were sold by the towing company as provided by RCW 46.55.130.

Mr. Potter brought this lawsuit based on this Court's decision in *All Around Underground v. Washington State Patrol*, 148 Wn.2d 145, 60 P.3d 53 (2002), which invalidated the State Patrol regulation mandating certain impounds.[1] The trial court dismissed the bulk of Mr. Potter's claims on a CR 12(b) motion, but certified his remaining conversion claim as a class action. The common issue is a legal theory that the State Patrol is liable for conversion for an impound ordered under the invalidated rule. Accordingly, the class is defined as:

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[1] In response to 1998 amendments to RCW 46.55.113, the State Patrol adopted WAC 204-96-010, which provided that when a driver is arrested for a violation of RCW 46.61.502, RCW 46.61.504, RCW 46.20.342 or RCW 46.20.420, "the arresting officer shall cause the vehicle to be impounded." CP 148-149. In *All Around Underground*, this Court considered consolidated appeals from two separate district court impound hearings under RCW 46.55.120. *All Around Underground*, 148 Wn.2d at 149-52. This Court held that the mandatory impound direction in WAC 204-96-010 exceeded the statutory authority of RCW 46.55.113 because it did not allow officers to exercise discretion. *Id.* at 162.

> Registered owners of motor vehicles that were impounded by the Washington State Patrol solely for Driving While License Suspended violations during the period of June 1, 2001 through December 19, 2002, who have not yet resorted to any other judicial or administrative method to challenge the legitimacy of the impound of their vehicle.

CP 12-14.

On August 30, 2007, this Court issued an opinion concluding that the immunity from civil liability under the *Restatement (Second) of Torts § 265,* for acts committed in the discharge of a duty or authority created by law did not apply to the State Patrol's impound of vehicles under the regulation invalidated in *All Around Underground. Potter v. Washington State Patrol*, 161 Wn.2d 335, 342, 166 P.3d 684 (2007). This Court reversed summary judgment and remanded the case for further proceedings. *Id.* The opinion specifically did not address the State Patrol's "arguments concerning the elements of conversion and the applicability of statutory sections relating to the impoundment process." *Id.* at *339,* n. 3.

The State Patrol filed a timely motion for reconsideration asking this Court to address its alternative argument that a conversion claim is barred if an owner fails to challenge an impound through the hearing provided by RCW 46.55.120. On March 7, 2008, this Court granted the motion and ordered supplemental briefing and argument.

II. ISSUE PRESENTED

A hearing under RCW 46.55.120 determines the validity of an impound and allows an owner to recover the vehicle, avoid the costs of impound, and obtain a judgment for loss of use of the vehicle and filing fees. RCW 46.55.120(2)(b) also provides that when an owner fails to request a hearing, the hearing is "waived" and the owner is "liable for any towing, storage, or other impoundment charges[.]" Where Mr. Potter waived the hearings and remedies available under RCW 46.55.120, can he challenge the impounds in a tort claim for conversion?

III. SUMMARY OF ARGUMENT

Mr. Potter's vehicles were impounded under RCW 46.55.113 after he was cited for driving while license suspended in the first degree, in violation of RCW 46.20.342(1)(a). Mr. Potter had the right to redeem his vehicles by paying certain impound costs under RCW 46.55.120(1). Alternatively, Mr. Potter could request a judicial hearing to challenge the impounds and obtain damages under RCW 46.55.120(2) and (3).

The language of RCW 46.55.120 and the legislative purposes of the statute displace and preempt a conversion claim. First, the statutory language and comprehensive procedures confirm that RCW 46.55.120 creates the exclusive process and remedy for challenging the validity of an impound under RCW 46.55.113. The statute provides for a prompt and

unambiguous determination of who is liable for the costs of the impound – the owner or the law enforcement agency. The determination is either made by a court, or, if the owner waives the hearing, the statute provides that the owner is liable for the costs of towing and storage. Thus, Mr. Potter's vehicles were sold only after he waived the hearing and did not pay the impound costs.

Second, a tort action claiming a conversion is not only contrary to the language of RCW 46.55.120, but would also frustrate the legislative purpose of promptly resolving disputes over impounds. The statute does not leave room for Mr. Potter to sit on his rights and then challenge the validity of his impound by claiming conversion. This Court should therefore affirm summary judgment for the State Patrol.

IV. STANDARD OF REVIEW

Appellate court review of a trial court order granting summary judgment is de novo. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). The appellate court may affirm on "any theory established by the pleadings and supported by the proof," even if the theory was not relied on by the trial court. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984). The issue presented by the State Patrol in this re-argument is a question of law reviewed de novo.

V. ARGUMENT

Whether a statutory remedy displaces or preempts a traditional common law remedy is a question of law that depends on the language and intent of the statute. *See Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 774 P.2d 1199 (1989) (products liability act preempts common law product liability torts); *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991) (common law tort of wrongful discharge in violation of public policy is not displaced by an Industrial Insurance Act (IIA) remedy where the director of Labor and Industries can investigate a complaint by worker discharged for filing an IIA compensation claim). In *Washington Water Power* and *Wilmot*, this Court resolved the issue based on the language and purposes of the statutes, and the nature and adequacy of the statutory remedies. *Washington Water Power*, 112 Wn.2d at 852-56, *Wilmot*, 118 Wn.2d at 54-66. These same considerations confirm that RCW 46.55.120 provides the exclusive remedy for challenging the validity of a vehicle impounded under chapter 46.55 RCW, for determining liability, and for assessing damages. The statutory remedy therefore displaces Mr. Potter's conversion claim and summary judgment should be affirmed.

A. RCW 46.55.120 Comprehensively Determines Who Is Responsible For Towing, Storage, and Impound Costs And Provides Damages

RCW 46.55.120 applies whenever a vehicle is impounded by a law enforcement agency under the authority of RCW 46.55.113(1), which authorizes officers to impound vehicles when the driver is driving while license suspended or revoked.[2] RCW 46.55.120(1) begins by stating that vehicles impounded under RCW 46.55.113, "may be redeemed *only* under the following circumstances." (Emphasis added.) First, an owner (or person with a right of possession) can produce proof of ownership or authorization, sign a receipt, and pay the costs of towing, storage, and services rendered during the impound. RCW 46.55.120(1)(a), (e).[3]

Importantly, redeeming the vehicle by paying the costs does not prevent the owner from challenging the impound. Under RCW 46.55.120(2)(b), every owner has a right to request a hearing in

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[2] RCW 46.55.120 also provides the same process for challenging impounds under RCW 46.55.113(2) (2008). Subsection (2) authorizes officers to take custody of vehicles and remove them to a place of safety under additional circumstances, including: vehicles standing on the roadway, vehicles unattended on a highway or at an accident scene, vehicles whose driver has been arrested, stolen vehicles, vehicles improperly parked in a disabled parking space or restricted zone, vehicles whose drivers do not have the required valid or specially endorsed license, and vehicles with expired registration over forty-five days parked on public streets.

[3] These are the only prerequisites to release for most impounds under RCW 46.55.113. Two additional requirements may apply if a vehicle is impounded for driving while license suspended and the owner is operating the vehicle at the time. First, the owner must show that applicable penalties, fines, and forfeitures have been satisfied. RCW 46.55.120(1)(e). Second, the owner must obtain an order allowing release if the vehicle was subject to a hold as allowed by RCW 46.55.120(1)(a). *Id.*

district or municipal court "*to contest the validity of the impoundment* or the amount of towing and storage charges." (Emphasis added.) This applies to "*[a]ny person* seeking to redeem an impounded vehicle . . . ." *Id.* The statute expressly grants jurisdiction to district and municipal courts to hear the challenge. *Id.* ("The district court has *jurisdiction to determine the issues involving all impoundments* including those authorized by the state or its agents. The municipal court has *jurisdiction to determine the issues involving impoundments* authorized by agents of the municipality.") (emphasis added).

A hearing is requested using a form provided for that purpose. RCW 46.55.120(2)(b). The request must be made within 10 days of being provided with written notice of the opportunity for the hearing in the manner described by subsection (2)(a), which provides that tow operators:

> [S]hall give to each person who seeks to redeem an impounded vehicle, . . . written notice of the right of redemption and opportunity for a hearing, which notice shall be accompanied by a form to be used for requesting a hearing, the name of the person or agency authorizing the impound, and a copy of the towing and storage invoice.

RCW 46.55.120(2)(a).

Within five days of the hearing request, the court provides notice of the hearing date and time to the tow operator, the impounding agency, the requester (and the owners if not the same). RCW 46.55.120(3)(a). At

the hearing, the court can consider "any relevant evidence" from the persons requesting the hearing. RCW 46.55.120(3)(b).

The statute addresses the critical question for every impound: is the vehicle owner or the law enforcement agency liable for the impound costs? If there is a hearing, this question is answered when the court determines "whether the impoundment was proper, . . . and who is responsible for payment of the fees." RCW 46.55.120(3)(c). If the impound is proper, the owner can be liable. RCW 46.55.120(3)(d). If an impound is invalid or violated the chapter, the owners:

> [S]hall bear no impoundment, towing, or storage fees, and any security shall be returned or discharged as appropriate, and the person or agency who authorized the impoundment shall be liable for any towing, storage, or impoundment fees permitted under this chapter.

RCW 46.55.120(3)(e). Plus, the court "shall enter judgment in favor of the [owners]" for the amount of the filing fee and, importantly, "reasonable damages for loss of the use of the vehicle during the time the same was impounded." *Id.* The court may also enter a judgment against the towing company if, for example, the towing charges were unlawful.[4]

Alternatively, if the owner does not challenge an impound, the

[4] The version of the statute in effect at the time Mr. Potter's vehicles were impounded provided for a judgment in favor of the owners for the filing fee and "reasonable damages for loss of the use of the vehicle during the time the same was impounded, for not less than fifty dollars per day, against the person or agency authorizing the impound." RCW 46.55.120(3)(e) (2000).

statute mandates that the owner is liable. "If the hearing request is not received by the court within the ten-day period, the right to a hearing is *waived* and the registered owner *is liable for* any towing, storage, or other impoundment charges . . . ." RCW 46.55.120(2)(b) (emphasis added). If the owner does not pay the costs and recover the vehicle after a hearing is waived, the vehicle can be sold at auction or for scrap. *See* RCW 46.55.130.

In summary, the statute determines the validity of the impound, who is liable for impound costs, and provides for damages and judgments if there is an invalid impound.

B. A Subsequent Conversion Claim Is Inconsistent With The Statutory Language of RCW 46.55.120

Both *Wilmot* and *Washington Water Power* examine the language of the statute to determine whether a statutory remedy displaces a traditional common law remedy for conversion. *Wilmot*, 118 Wn.2d at 55-58; *Washington Water Power,* 112 Wn.2d at 853. There is no requirement that a statute expressly preempt a common law claim where that legislative intent is clear from statutory language and purposes. *Washington Water Power,* 112 Wn.2d at 853, 855.

Here, the language of RCW 46.55.120 confirms that it provides a comprehensive remedy for challenging impounds. The statute begins by

stating that impounded vehicles "may be redeemed *only* under the following circumstances." RCW 46.55.120(1). As noted in Justice Madsen's dissent, these words demonstrate an exclusive remedy:

> [B]y its plain language, the statute provides that *only* the provisions in the statute may be employed to redeem an impounded vehicle, and redeeming an impounded vehicle includes a challenge to the validity of the impound. By its plain language, the statute provides that its procedures and remedies are the only recourse for an invalid impoundment, thus precluding a common law tort claim. The language of the statute strongly supports, if not commands, the conclusion that the statutory remedies are exclusive. *See Wilmot*, 118 Wn.2d at 55–58.

Potter, 161 Wn.2d at 350 (Madsen, J., dissenting) (emphasis in original).

The statutory language further demonstrates the intent to create an exclusive remedy because it determines liability whether a hearing is waived or held. As stated in subsection (2)(b), if the "right to a hearing is *waived* [then] the registered owner *is liable for* any towing, storage, or other impoundment charges . . . ." RCW 46.55.120(2)(b). Alternatively, where a hearing is held, subsection (3)(c) provides: "[a]t the conclusion of the hearing, *the court shall determine . . . who is responsible* for the payment of the [towing and storage] fees." RCW 46.55.120(3)(c). If the court finds the impound is improper, then the owner bears no costs and the law enforcement agency "is liable for any towing, storage or other impoundment fees . . . ." RCW 46.55.120(3)(e). The statutory language

leaves no room for a later conversion claim to re-determine the validity of an impound and liability for these costs.

Mr. Potter focuses on the words "right" and "opportunity" and argues that these words are not sufficiently explicit to make RCW 46.55.120(2) the exclusive means for challenging impounds. Appellant's Answer at 4-6. But there is no need for express language to preempt the common law. *See Washington Water Power*, 112 Wn.2d at 853. Instead, read as a whole, this statutory language is clear. The statutory procedure must be used, or the "the right to a hearing is *waived*" showing that the statute conclusively determines liability for the impound costs. RCW 46.55.120(2)(b).

This Court should therefore reject Mr. Potter's argument that this language should be construed to waive only his right to the hearing under RCW 46.55.120, not a later hearing alleging conversion. Mr. Potter's interpretation is contradicted by the statute as a whole, which mandates that the owner "is liable" if the hearing is waived. RCW 46.55.120(2)(b)

Finally, the other statutory language confirms that the statutory remedy is intended to address and determine "the validity of the impoundment." RCW 46.55.120(2)(b). Again, the natural reading of this language is to displace Mr. Potter's conversion claim because it challenges the validity of the impound and the determination of liability.

C. Allowing A Conversion Claim To Challenge The Validity Of An Impound Defeats The Legislative Purposes Of RCW 46.55.120

Both *Wilmot* and *Washington Water Power* focus on whether the common law claim in question is consistent with the legislative purposes of the statutory remedy. *Wilmot*, 118 Wn.2d at 63-65; *Washington Water Power*, 112 Wn.2d at 854. When this consideration is applied to the present case, it demonstrates that RCW 46.55.120 displaces a common law conversion claim.

The purposes of RCW 46.55.120 are shown by its language and structure. The statute unambiguously addresses the validity of an impound and who is responsible for impound costs. It provides for recovery of the vehicle, damages for loss of use, and reimburses the filing fees for the statutory hearing. The statute is directed to all the interested parties: owners (legal and registered), drivers, law enforcement agencies, and towing companies. The purposes served by a prompt resolution of liability are defeated if a conversion claim litigates the validity of the impound and attacks the liability imposed by the statute.

The statute, moreover, does more than merely avoid potentially stale conversion claims litigating the factual or legal basis for an impound months or years later. Allowing Mr. Potter to claim a conversion leads to an absurd result in light of the comparative rights of those owners who

requested hearings and received a final determination regarding the impound.

This is illustrated by considering an owner who requested a statutory hearing and prevailed (as in *All Around Underground*, 148 Wn.2d at 149-52). That owner is made whole and has no claim for conversion damages. Similarly, an owner has no viable conversion claim if he or she requested a statutory hearing and the district court determined that the impound was valid. At the very least, issue preclusion bars the owner from re-litigating the specific issues decided in the impound hearing: validity of the impound and liability for the impound costs. *See generally* 14A Karl B. Tegland, *Washington Practice, Civil Procedure* § 35.32 (2003) (Collateral Estoppel (Issue Preclusion) Generally).

In contrast, consider Mr. Potter and owners who waived the statutory hearing. Notwithstanding the waiver and the statutory mandate that they are "liable for" impound costs, RCW 46.55.120(2)(b), Mr. Potter argues that these owners should have the opportunity to challenge the validity of the impound in a conversion claim. It would make little sense for the legislature to preserve a conversion claim for owners who waive the hearing, when no such remedy is available to owners who diligently follow the statute.

The intent to create a final determination is also reflected in the

costs and damages that are explicitly covered by the statute. Towing and storage fees are inherent in an impound, and the statute shifts those fees to the law enforcement agency when the impound is invalid (along with filing fees and damages for temporary loss of use). The statute thus addresses costs that are both necessary to, and incidental to, a promptly resolved impound.

Mr. Potter's conversion claim, in contrast, focuses on the value of his vehicles that were sold at auction. However, the statute provides multiple options which, if utilized, avoid the sale of vehicles. A conversion claim for damages beyond those addressed by the statute would impose liability only because the matter was not resolved by the hearing. Thus, an important effect of a final decision under RCW 46.55.120 is that it resolves the matter when towing and storage costs, filing fees, and loss of use damages are the only issues.

A common law conversion claim is therefore *inconsistent* with the clear statutory purpose to ensure a prompt and final determination for all impounds. The owner can either promptly challenge the impound and obtain relief under the statute, or waive the hearing. Additionally, in any case, the owners can always pay their impound costs and recover the vehicle as allowed by RCW 46.55.120(1).

D. RCW 46.55.120 Provides A Remedy That Is Speedy and Comprehensively Addresses Damages From An Impound

To evaluate whether the common law remedy was displaced, *Wilmot* also addressed the comprehensiveness of the statutory remedy and whether a cause of action existed at common law. *Wilmot* 118 Wn.2d at 61-62. As a threshold matter, no court has held that there is a conversion when a vehicle is impounded under the circumstances of this case, where there is no intention to deprive the owner of permanent possession and where the owner has explicit statutory rights to redeem or challenge the impound. Assuming for argument that a conversion claim even exists, the remedy provided by RCW 46.55.120 is comprehensive and certain, confirming that the statute displaces the common law conversion claim.[5]

First, the statutory remedy is particularly prompt, which is a procedural and substantive benefit to all persons affected. Specifically, a prompt remedy mitigates the accrual of storage costs when the owner has not arranged for release.

Second, the statutory remedies are precisely attuned to the situation of an owner alleging an invalid impound. The owner can quickly obtain a

[5] To argue that his impound is a conversion, Mr. Potter cites *Boss v. City of Spokane*, 63 Wn.2d 305, 387 P.2d 67 (1963). Appellant's Answer at 12. *Boss* does not discuss the issues raised by the State Patrol, where a statute allows vehicle owners to challenge the impound or obtain prompt release. The State Patrol therefore does not concede that an impound is a conversion. Those issues of law and fact remain preserved, if a remand is necessary. *See Potter,* 161 Wn.2d at 339, n. 3.

ruling that he or she bears no liability for towing or storage fees, recover filing fees, recover the damages for loss of use, and recover the vehicle. Thus, the statute provides or obviates the same issues that would later be raised in a conversion claim.

Finally, the statute provides a number of options that an owner can use in combination: paying the costs to recover the vehicle while challenging the impound, challenging the impound, or recovering the vehicle after losing a challenge. All of these ensure that the owner can limit liability to towing and storage costs.[6]

1. Mr. Potter Cannot Show That The Remedy of RCW 46.55.120(3) Is Inadequate

Mr. Potter argues the statutory remedy is inadequate because it doesn't provide damages for lost value where a vehicle is sold. Appellant's Answer at 7-8. But where the statutory procedures are utilized, a vehicle will not be sold. Mr. Potter's argument that a vehicle might be sold while an appeal from a lost impound hearing is pending is also without merit. This does not impeach the statutory remedy because the owner would have first received a hearing under RCW 46.55.120. If the owner lost and appealed, the owner could still pay the required costs to

[6] Unredeemed vehicles are sold under the authority of RCW 46.55.130, but only after RCW 46.55.120(2)(b) establishes that the owner is liable for towing and storage fees. If proceeds at auction exceed towing and storage fees, the owner can recover that money. RCW 46.55.130(2)(h). Thus, the statutory remedy is comprehensive by also addressing the circumstances where the value of a vehicle exceeds the owner's liability.

redeem the vehicle while appealing to claim the additional remedies in RCW 46.55.120(3). The owner could also post a bond to secure the appeal. Because the towing company is usually a party in an impound hearing, RCW 46.55.120(3)(a), the towing company would also receive notice of an appeal and be subject to the court's jurisdiction during a pending appeal. *See also* WAC 308-61-168(1) (tow operator shall not sell vehicle while judicial dispute over impound is still pending).[7]

Alternatively, Mr. Potter justifies a conversion claim by arguing that the statutory remedy limits damages for loss of use. Appellant's Answer at 7. He points to one narrow limitation where the statute provides that:

> [I]f an impoundment arising from an alleged violation of RCW 46.20.342 or 46.20.345 is determined to be in violation of this chapter, then the law enforcement officer directing the impoundment and the government employing the officer are not liable *for damages* if the officer relied in good faith and without gross negligence on the records of the department in ascertaining that the operator of the vehicle had a suspended or revoked driver's license. . . .

RCW 46.55.120(3)(e) (emphasis added).

This limitation, applicable only in one specified situation, confirms that the legislature has adopted a policy that displaces the common law

[7] On a related note, Mr. Potter suggests that an owner might not be able to afford redemption fees or filing fees for the statutory hearing. A civil suit for conversion and the statutory hearing both require filing fees. The costs or fees are not a reason to conclude that the legislature intended to preserve the common law claim here.

conversion claim. If a conversion claim exists, it bypasses this limitation and frustrates express legislative language and policy.

Mr. Potter, moreover, errs by treating this limitation as if it broadly absolves law enforcement agencies whenever department of licensing records are relied upon. *See* Appellant's Answer at 8-9. On its face, this limit does not apply to the majority of impounds allowed by RCW 46.55.113; it is relevant only to impounds for driving while license suspended. Second, this limit only affects loss of use damages. The owner still avoids liability for towing and storage and recovers filing fees. *Becerra v. City of Warden*, 117 Wn. App. 510, 521, 71 P.3d 226 (2003).[8] Thus, this narrow limitation on damages does not provide a reason to allow a conversion claim, it provides an additional indication that the statute provides an exclusive remedy for challenging the validity of impounds. *Whatcom Cy. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.").

[8] Mr. Potter points out that in *Becerra*, 117 Wn. App. at 521, the Court of Appeals found the city's impound ordinance invalid under *All Around Underground* but denied the owner loss of use damages based on RCW 46.55.120(3)(e). The present case does not require this Court to construe or apply this limitation, but *Becerra* is subject to reasonable dispute and is not binding on this Court. The limit appears to apply only to an arrest for driving while license suspended when the official records turn out to be erroneous.

Mr. Potter argues that district courts might not be properly applying the statute, and cites a flyer purportedly from the Kitsap County District Court which said hearings were not available. Appellant's Answer at 9-10; CP 207-208. There is no evidence of the context for the flyer or how it was applied. The flyer, however, is legally irrelevant to the question of law before this Court. If one district court had an erroneous view of a question of law, this Court's opinion would correct that error.

Finally, Mr. Potter raises a number of procedural differences in the remedy: the lack of a jury trial, the admission of an impounding officer's sworn report, and the short limitations period. Appellant's Answer at 10-11. This focus on procedural distinctions is not material. As this Court explained in *Wilmot*:

> [I]t is not simply the presence or absence of a remedy which is significant; rather, the comprehensiveness, or adequacy, of the remedy provided is a factor which courts . . . have considered in deciding whether a statute provides the exclusive remedies . . . . Further, it is one fact or consider, along with others relating to legislative intent.

Wilmot, 118 Wn.2d at 61. In the present case, the remedies in the district and municipal court are speedy and robust. The short statute of limitation is necessary because liability for impound costs must be addressed while storage costs are potentially accruing. [9]

[9] Additionally, although the RCW 46.55.120(3)(b) provides that the court "may consider a written report made under oath by the officer . . . in lieu of the officer's

Therefore, the statutory remedy of RCW 46.55.120 does not leave room for the common law remedy as in *Wilmot.* Instead, the remedy, as well as the language and statutory purposes, demonstrate that RCW 46.55.120(2) displaces a common law cause of action for conversion.

2. Cases Cited By Mr. Potter Do Not Support Allowing A Conversion Claim To Challenge The Validity Of An Impound

Mr. Potter cites several cases to argue that a common law tort remedy should co-exist with the comprehensive remedy of RCW 46.55.120(3). Appellant's Answer at 13-17. However, the statutes in these cases differ in language and structure from RCW 46.55.120. None are as clear as RCW 46.55.120, with statutory language that explicitly determines liability for an impound either with a hearing, or by assigning it to the owner if the hearing is waived. Moreover, none of the cases cited by Mr. Potter involve statutory frameworks that would be as clearly frustrated as in the statute at issue in this case.

In *Van Blaricom v. Kronenberg*, 112 Wn. App. 501, 506, 50 P.3d 266 (2002), the order discharging the writ of attachment "specifically reserved ruling on the Van Blaricoms' claim for wrongful attachment."

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personal appearance" there is nothing that prohibits the officer from being subpoenaed to testify in person. Further, State Patrol officers routinely appear at disputed impound hearings.

Accordingly, it does not appear that all of the issues, including damages, were resolved during the challenge to the writ. In contrast, RCW 46.55.120 provides for the resolution of all issues relating to an impound either in the hearing or by waiver of the hearing.

In *Berger v. Sonneland*, 144 Wn.2d 91, 93-94, 26 P.3d 257 (2001), the plaintiff brought a medical malpractice action against a physician based on the unauthorized disclosure of medical records. At issue was whether the cause of action must be brought under the Uniform Health Care Information Act, chapter 70.02 RCW, which governs disclosure of health care information, or whether it could be brought as part of a medical malpractice action. *Id.* at 94. This Court held that plaintiff was not required to bring the action under RCW 70.02.170, which provides a civil cause of action for violation of the Act. *Id.* at 106. Unlike the statute at issue in the present case, nothing in the language, structure or procedure of RCW 70.02.170 suggests that it displaces the common law remedy.

In *Flannery v. Bishop*, 81 Wn.2d 696, 697, 504 P.2d 778 (1972), the plaintiff sought to have a contract declared usurious. This Court disagreed with the defendant's argument that RCW 19.52.032, which provides for a declaratory judgment action to establish usury, was the exclusive remedy. *Id.* at 700-02. *Flannery* is distinguishable because RCW 19.52.032 simply allowed for a declaratory judgment and did not

contain the language and purposes similar to those which resolve the validity of an impound in the present case.

The statute at issue in *Leach v. Rich*, 138 Tenn. 94, 96 S.W. 138-40 (Tenn. 1917), did not contain language indicating that its use was mandatory or that failure to utilize it constituted a waiver. Moreover, it appears that there was another statutory provision that specifically provided that the remedy was cumulative and did not deprive a plaintiff of other remedies. *Id.* No such provision exists in the present case.

In *Moreno v. City of New York*, 69 N.Y.2d 432, 434, 508 N.E.2d 645 (N.Y. 1987), the city's unclaimed property ordinance was at issue. Such ordinances and statutes do not afford a procedure for challenging the seizure of the property, nor do they provide for damages, rather they simply outline the time that the property will be held. Contrary to Mr. Potter's assertion, there is no comparison between the ordinance at issue in *Moreno* and the comprehensive statute at issue in this case.

E. The Constitution Allows The Legislature To Assign District And Municipal Courts Exclusive Jurisdiction To Determine The Validity of Impounds

As his final argument, Mr. Potter contends that superior courts have a constitutional interest in "concurrent jurisdiction" over the subject of invalid impounds, justifying the conclusion that conversion claims are not displaced. Appellant's Answer at 19. The constitution, however,

expressly provides for this type of hearing in district or municipal court. Article IV, § 6 of the Washington State Constitution provides that superior court jurisdiction applies "in all cases and . . . all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court . . . ." Here, RCW 46.55.120, gives district and municipal courts "jurisdiction" to address the "validity of impounds" and order relief. Article IV, § 6 also provides that superior courts may have "appellate jurisdiction" for some cases, which describes the superior courts review of impound hearings. *See generally,* RALJ Titles 1 and 2.

Article II, § 26 also applies to the present case, because the challenge to the validity of a government-ordered impound is a type of suit against the state and its local governments: "The legislature shall direct by law, in what manner, and *in what courts*, suits may be brought against the state." *See State ex rel. Shomaker v. Superior Court for King County*, 193 Wash. 465, 469-70, 76 P.2d 306 (1938).

Mr. Potter's reliance on the constitutional jurisdiction of the superior court ultimately says only that exceptions to superior court jurisdiction are construed narrowly. This consideration, however, is fully addressed by the analysis in *Washington Water Power* and *Wilmot* which confirms that RCW 46.55.120 precludes a later conversion claim premised on challenging the validity of an impound.

This Court should also reject Mr. Potter's analogy to the claims addressed in *Orwick v. Seattle,* 103 Wn.2d 249, 692 P.2d 793 (1984). In *Orwick,* the city argued that a lawsuit "arose under" a Seattle municipal ordinance and thus municipal courts had exclusive jurisdiction under RCW 35.20.030. This Court, however, held the nature of the cause of action did not "arise under" a municipal ordinance; the plaintiffs sought constitutional relief based on broad system-wide complaints that the procedures of the Seattle Municipal Court violated statutory authority for traffic infractions, and that Seattle used inaccurate radar equipment with inadequately trained officers. *Id.* at 250-52.

Mr. Potter, in contrast, makes no constitutional claims, nor is the State Patrol's argument analogous to *Orwick.* Mr. Potter presents a conversion claim premised on challenging the validity of an individual impound. He extends the individual conversion claim to a class using a common legal theory. This is not a broad "system-wide" claim about State Patrol practices. Mr. Potter's claim is properly denied because it depends on invalidating the impound and re-challenging the determination of liability made by RCW 46.55.120(2)(b). *See* RAP 2.5(a)(2) (appeals

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court can address failure to establish facts upon which relief can be granted).[10]

VI. CONCLUSION

The State Patrol respectfully requests that this Court affirm the trial court order granting summary judgment in favor of the State Patrol and dismissing Mr. Potter's lawsuit with prejudice.

RESPECTFULLY SUBMITTED this 4th day of April, 2008.

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FILED AS ATTACHMENT TO E-MAIL

[10] Admittedly, in briefing at the superior court, the State Patrol described the statutory bar to the conversion claim in terms of jurisdiction. The State Patrol's point, however, is that the superior court cannot entertain this common law claim.

APPENDIX

RCW 46.55.120
Redemption of vehicles — Sale of unredeemed property — Improper impoundment.

(1) Vehicles or other items of personal property registered or titled with the department that are impounded by registered tow truck operators pursuant to RCW 46.55.080, 46.55.085, 46.55.113, or 9A.88.140 may be redeemed only under the following circumstances:

(a) Only the legal owner, the registered owner, a person authorized in writing by the registered owner or the vehicle's insurer, a person who is determined and verified by the operator to have the permission of the registered owner of the vehicle or other item of personal property registered or titled with the department, or one who has purchased a vehicle or item of personal property registered or titled with the department from the registered owner who produces proof of ownership or written authorization and signs a receipt therefor, may redeem an impounded vehicle or items of personal property registered or titled with the department. In addition, a vehicle impounded because the operator is in violation of RCW 46.20.342(1)(c) shall not be released until a person eligible to redeem it under this subsection (1)(a) satisfies the requirements of (e) of this subsection, including paying all towing, removal, and storage fees, notwithstanding the fact that the hold was ordered by a government agency. If the department's records show that the operator has been convicted of a violation of RCW 46.20.342 or a similar local ordinance within the past five years, the vehicle may be held for up to thirty days at the written direction of the agency ordering the vehicle impounded. A vehicle impounded because the operator is arrested for a violation of RCW 46.20.342 may be released only pursuant to a written order from the agency that ordered the vehicle impounded or from the court having jurisdiction. An agency may issue a written order to release pursuant to a provision of an applicable state agency rule or local ordinance authorizing release on the basis of the following:

(i) Economic or personal hardship to the spouse of the operator, taking into consideration public safety factors, including the operator's criminal history and driving record; or

(ii) The owner of the vehicle was not the driver, the owner did not know that the driver's license was suspended or revoked, and the owner has not received a prior release under this subsection or RCW 46.55.113(3).

In order to avoid discriminatory application, other than for the reasons for release set forth in (a)(i) and (ii) of this subsection, an agency shall, under a provision of an applicable state agency rule or local ordinance, deny release in all other circumstances without discretion.

If a vehicle is impounded because the operator is in violation of RCW 46.20.342(1) (a) or (b), the vehicle may be held for up to thirty days at the written direction of the agency ordering the vehicle impounded. However, if the department's records show that the operator has been convicted of a violation of RCW 46.20.342(1) (a) or (b) or a similar local ordinance within the past five years, the vehicle may be held at the written direction of the agency ordering the vehicle impounded for up to sixty days, and for up to ninety days if the operator has two or more such prior offenses. If a vehicle is impounded because the operator is arrested for a violation of RCW 46.20.342, the vehicle may not be released until a person eligible to redeem it under this subsection (1)(a) satisfies the requirements of (e) of this subsection, including paying all towing, removal, and storage fees, notwithstanding the fact that the hold was ordered by a government agency.

(b) If the vehicle is directed to be held for a suspended license impound, a person who desires to redeem the vehicle at the end of the period of impound shall within five days of the impound at the request of the tow truck operator pay a security deposit to the tow truck operator of not more than one-half of the applicable impound storage rate for each day of the proposed suspended license impound. The tow truck operator shall credit this amount against the final bill for removal, towing, and storage upon redemption. The tow truck operator may accept other sufficient security in lieu of the security deposit. If the person desiring to redeem the vehicle does not pay the security deposit or provide other security acceptable to the tow truck operator, the tow truck operator may process and sell at auction the vehicle

as an abandoned vehicle within the normal time limits set out in RCW 46.55.130(1). The security deposit required by this section may be paid and must be accepted at any time up to twenty-four hours before the beginning of the auction to sell the vehicle as abandoned. The registered owner is not eligible to purchase the vehicle at the auction, and the tow truck operator shall sell the vehicle to the highest bidder who is not the registered owner.

(c) Notwithstanding (b) of this subsection, a rental car business may immediately redeem a rental vehicle it owns by payment of the costs of removal, towing, and storage, whereupon the vehicle will not be held for a suspended license impound.

(d) Notwithstanding (b) of this subsection, a motor vehicle dealer or lender with a perfected security interest in the vehicle may redeem or lawfully repossess a vehicle immediately by payment of the costs of removal, towing, and storage, whereupon the vehicle will not be held for a suspended license impound. A motor vehicle dealer or lender with a perfected security interest in the vehicle may not knowingly and intentionally engage in collusion with a registered owner to repossess and then return or resell a vehicle to the registered owner in an attempt to avoid a suspended license impound. However, this provision does not preclude a vehicle dealer or a lender with a perfected security interest in the vehicle from repossessing the vehicle and then selling, leasing, or otherwise disposing of it in accordance with chapter 62A.9A RCW, including providing redemption rights to the debtor under RCW 62A.9A-623. If the debtor is the registered owner of the vehicle, the debtor's right to redeem the vehicle under chapter 62A.9A RCW is conditioned upon the debtor obtaining and providing proof from the impounding authority or court having jurisdiction that any fines, penalties, and forfeitures owed by the registered owner, as a result of the suspended license impound, have been paid, and proof of the payment must be tendered to the vehicle dealer or lender at the time the debtor tenders all other obligations required to redeem the vehicle. Vehicle dealers or lenders are not liable for damages if they rely in good faith on an order from the impounding agency or a court in releasing a vehicle held under a suspended license impound.

(e) The vehicle or other item of personal property registered or titled with the department shall be released upon the presentation to any person having custody of the vehicle of commercially reasonable tender sufficient to cover the costs of towing, storage, or other services rendered during the course of towing, removing, impounding, or storing any such vehicle, with credit being given for the amount of any security deposit paid under (b) of this subsection. In addition, if a vehicle is impounded because the operator was arrested for a violation of RCW 46.20.342 or 46.20.345 and was being operated by the registered owner when it was impounded under local ordinance or agency rule, it must not be released to any person until the registered owner establishes with the agency that ordered the vehicle impounded or the court having jurisdiction that any penalties, fines, or forfeitures owed by him or her have been satisfied. Registered tow truck operators are not liable for damages if they rely in good faith on an order from the impounding agency or a court in releasing a vehicle held under a suspended license impound. Commercially reasonable tender shall include, without limitation, cash, major bank credit cards issued by financial institutions, or personal checks drawn on Washington state branches of financial institutions if accompanied by two pieces of valid identification, one of which may be required by the operator to have a photograph. If the towing firm cannot determine through the customer's bank or a check verification service that the presented check would be paid by the bank or guaranteed by the service, the towing firm may refuse to accept the check. Any person who stops payment on a personal check or credit card, or does not make restitution within ten days from the date a check becomes insufficient due to lack of funds, to a towing firm that has provided a service pursuant to this section or in any other manner defrauds the towing firm in connection with services rendered pursuant to this section shall be liable for damages in the amount of twice the towing and storage fees, plus costs and reasonable attorney's fees.

(2)(a) The registered tow truck operator shall give to each person who seeks to redeem an impounded vehicle, or item of personal property registered or titled with the department, written notice of the right of redemption and opportunity for a hearing, which notice shall be accompanied by a form to be used for requesting a hearing, the name of the person or agency authorizing the impound, and a copy of the towing and storage invoice. The registered tow truck operator shall maintain a record evidenced by the redeeming person's signature that such notification was provided.

(b) Any person seeking to redeem an impounded vehicle under this section has a right to a hearing in the district or municipal court for the jurisdiction in which the vehicle was impounded to contest the validity of the impoundment or the amount of towing and storage charges. The district court has jurisdiction to determine the issues involving all impoundments including those authorized by the state or its agents. The municipal court has jurisdiction to determine the issues involving impoundments authorized by agents of the municipality. Any request for a hearing shall be made in writing on the form provided for that purpose and must be received by the appropriate court within ten days of the date the opportunity was provided for in subsection (2)(a) of this section and more than five days before the date of the auction. At the time of the filing of the hearing request, the petitioner shall pay to the court clerk a filing fee in the same amount required for the filing of a suit in district court. If the hearing request is not received by the court within the ten-day period, the right to a hearing is waived and the registered owner is liable for any towing, storage, or other impoundment charges permitted under this chapter. Upon receipt of a timely hearing request, the court shall proceed to hear and determine the validity of the impoundment.

(3)(a) The court, within five days after the request for a hearing, shall notify the registered tow truck operator, the person requesting the hearing if not the owner, the registered and legal owners of the vehicle or other item of personal property registered or titled with the department, and the person or agency authorizing the impound in writing of the hearing date and time.

(b) At the hearing, the person or persons requesting the hearing may produce any relevant evidence to show that the impoundment, towing, or storage fees charged were not proper. The court may consider a written report made under oath by the officer who authorized the impoundment in lieu of the officer's personal appearance at the hearing.

(c) At the conclusion of the hearing, the court shall determine whether the impoundment was proper, whether the towing or storage fees charged were in compliance with the posted rates, and who is responsible for payment of the fees. The court may not adjust fees or charges that are in compliance with the posted or contracted rates.

(d) If the impoundment is found proper, the impoundment, towing, and storage fees as permitted under this chapter together with court costs shall be assessed against the person or persons requesting the hearing, unless the operator did not have a signed and valid impoundment authorization from a private property owner or an authorized agent.

(e) If the impoundment is determined to be in violation of this chapter, then the registered and legal owners of the vehicle or other item of personal property registered or titled with the department shall bear no impoundment, towing, or storage fees, and any security shall be returned or discharged as appropriate, and the person or agency who authorized the impoundment shall be liable for any towing, storage, or other impoundment fees permitted under this chapter. The court shall enter judgment in favor of the registered tow truck operator against the person or agency authorizing the impound for the impoundment, towing, and storage fees paid. In addition, the court shall enter judgment in favor of the registered and legal owners of the vehicle, or other item of personal property registered or titled with the department, for the amount of the filing fee required by law for the impound hearing petition as well as reasonable damages for loss of the use of the vehicle during the time the same was impounded against the person or agency authorizing the impound. However, if an impoundment arising from an alleged violation of RCW 46.20.342 or 46.20.345 is determined to be in violation of this chapter, then the law enforcement officer directing the impoundment and the government employing the officer are not liable for damages if the officer relied in good faith and without gross negligence on the records of the department in ascertaining that the operator of the vehicle had a suspended or revoked driver's license. If any judgment entered is not paid within fifteen days of notice in writing of its entry, the court shall award reasonable attorneys' fees and costs against the defendant in any action to enforce the judgment. Notice of entry of judgment may be made by registered or certified mail, and proof of mailing may be made by affidavit of the party mailing the notice. Notice of the entry of the judgment shall read essentially as follows:

TO: . . . . . .

YOU ARE HEREBY NOTIFIED JUDGMENT was entered against you in the . . . . . Court located at . . . . . in the sum of $. . . . ., in an action entitled . . . . . ., Case No. . . . . YOU ARE FURTHER NOTIFIED that attorneys fees and costs will be awarded against you under RCW . . . if the judgment is not paid within 15 days of the date of this notice.

DATED this . . . . day of . . . . . ., (year) . . .

Signature . . . . . .

Typed name and address

of party mailing notice

(4) Any impounded abandoned vehicle or item of personal property registered or titled with the department that is not redeemed within fifteen days of mailing of the notice of custody and sale as required by RCW 46.55.110(3) shall be sold at public auction in accordance with all the provisions and subject to all the conditions of RCW 46.55.130. A vehicle or item of personal property registered or titled with the department may be redeemed at any time before the start of the auction upon payment of the applicable towing and storage fees.

[2004 c 250 § 1; 2003 c 177 § 2; 2000 c 193 § 1. Prior: 1999 c 398 § 7; 1999 c 327 § 5; 1998 c 203 § 5; 1996 c 89 § 2; 1995 c 360 § 7; 1993 c 121 § 3; 1989 c 111 § 11; 1987 c 311 § 12; 1985 c 377 § 12.]

Notes:

Findings -- Intent -- 1999 c 327: See note following RCW 9A.88.130.

Finding -- 1998 c 203: See note following RCW 46.55.105.

NO. 79172-4

SUPREME COURT OF THE STATE OF WASHINGTON

MARK POTTER,

Appellant,

v.

WASHINGTON STATE PATROL,

Respondent.

DECLARATION OF SERVICE

I certify that I served a copy of SUPPLEMENTAL BRIEF OF RESPONDENT WASHINGTON STATE PATROL on all parties or their counsel of record on the date below as follows:

- ☐ US Mail Postage Prepaid
- ☐ Federal Express
- ☒ ABC/Legal Messenger
- ☐ Hand delivered

TO:

ADAM J BERGER
SCHROETER GOLDMARK & BENDER
500 CENTRAL BUILDING
810 THIRD AVENUE
SEATTLE WA 98104

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 4th day of April 2008, at Seattle, Washington.

Victoria Robben
VICTORIA ROBBEN

OFFICE RECEPTIONIST, CLERK

To: Robben, Victoria (ATG)
Subject: RE: Filing for 79172-4

Rec. 4-4-08

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Robben, Victoria (ATG) [mailto:Victoria.Robben@atg.wa.gov]
Sent: Friday, April 04, 2008 1:07 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Inglis, Shannon (ATG); Geck, Jay (ATG)
Subject: Filing for 79172-4

RE: Mark Potter v. Washington State Patrol, WSSC No. 79172-4

Dear Clerk:

Attached for filing in the above-referenced matter, please find the following documents (scanned and attached as one):

1) Supplemental Brief of Respondent Washington State Patrol

2) Declaration of Service

<<Potter - Resp Supp Brief.pdf>>

This brief is being filed by Assistant Attorney General Shannon Inglis, WSBA #23164. Ms. Inglis can be reached at 206-389-2006 or shannoni@atg.wa.gov

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me at the number below or via return e-mail.

Sincerely,

Victoria L. Robben

Legal Assistant
Office of the Attorney General
Criminal Justice Division - Seattle
206-389-3010 (phone)
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